

BEFORE THE TENNESSEE STATE BOARD OF EDUCATION


v.

OAK RIDGE CITY SCHOOLS


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|
| NO. 99-32
|
|

FINAL ORDER

DANIEL B. EISENSTEIN
Administrative Law Judge
Suite 500, One Church Street
Nashville, Tennessee 37201
(615) 242-2521

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Final Order was mailed to Sal Varsalona, Attorney, P.O. Box 299, Clinton, Tennessee 37717, and to Jim Webster, Attorney, 231 Jackson Square, Oak Ridge, Tennessee 37830, on this the 12th day of October, 1999.


Daniel B. Eisenstein

FINAL ORDER

No. 99-32

Procedural History

This matter was brought based upon the request for a Due Process Hearing lodged by the parents of the child through their attorney with the State Department of Education on May 3, 1999. A Pre-Hearing Conference was initially scheduled for May 25, 1999 but was continued at the request of the child's attorney and the attorney for the school system until July 20, 1999. At the Pre-Hearing Conference the parties submitted that the issue to be heard at the trial was as follows:

"Whether or not the child's behavior which resulted in the child being assigned to an alternative school setting was a manifestation of the child's disability and thus, was the placement by the school an appropriate placement." (Pre-Hearing Order)

Pre-petition briefs were submitted by the parties and the due process hearing was held on two days, August 3, 1999 and September 2, 1999. No post hearing briefs have been filed.

Factual Background

The student is presently a fourteen (14) year old girl (D.O.B. [REDACTED]) who lives with both parents in Oak Ridge, Tennessee. (Statistical information contained in Exhibit 1 - IEP 1999-2000 7/12/99) The parents of the child are both highly educated. The father of the child has a doctorate in physics (Trans. P. 159) and the mother has a masters degree in both physics and nuclear engineering (Trans. P. 191). The parents have a son three years older than the child in question who has also received special education services from the school system. (Trans. pp. 194 and 198) In 1994 the father requested the school system evaluate his daughter to determine if she could be considered as intellectually gifted. (Trans. pp. 178) There was no request in regard to any

evaluation for emotional disturbance. (Trans. P. 178) In fact, the school system found that the child was "Intellectually Gifted" and fell within a disability category set forth in *Tennessee Code Annotated Section 49-10-102(1)(A)* (See Exhibit 1 - Notice of M. Term 12/7/94). Although there was some concern that the child may be somewhat depressed (Petitioner's Exhibit 1 - Student Referral Form 9/12/94) the psychological report dated 11/3/99 and 11/8/94 found as follows:

(The child's) present level of intellectual functioning is within the Very Superior range. She excels in all academic areas. (The child) seems to be experiencing conflicted feelings about school and social relationships. With guidance from her parents and teacher, she may be helped to direct in positive ways.

The results of this evaluation indicate that (the child) can be considered to have a handicapping condition as defined by Tennessee State Rules and Regulations and qualifies for Special Services. Subject to Evaluation Team concurrence, she may be certified as Intellectually Gifted given her intellectual ability and achievement potential are outstanding. (The child) meets the criteria by exhibiting intellectual functioning and ability which measures at least two Standard deviations about normal, and Superior academic ability which measures at or above the 96th percentile in the areas of reading, mathematics, language and science. (Petitioner's Exhibit 2 - Psychological Report 11-3-94 and 11-8-94)

During the various IEP-Team meetings covering the child through the years the parents were supplied with a booklet entitled "Rights of Children with Disabilities and Parent Responsibilities" published by the Tennessee Department of Education. (Exhibit 2) The father looked through this pamphlet (Trans. p. 77) and the mother read it "cover to cover." (Trans. pp. 195-196)

Based on the child being certified as intellectually gifted, she was placed in advanced classes and received special services from a "gifted teacher." One of the child's gifted teachers, Shelly Devallette, testified that she began working with the child in the sixth grade. Ms. Devallette testified that as a special education gifted teacher she was responsible for "monitoring and developing plans for special ed gifted students whose needs are beyond the basic ed curriculum." (Trans. p. 232) Ms. Devallette found the child to show defiance toward school, however this defiance seemed to be directed at teachers she did not like. (Trans. pp. 236-237) Ms. Devallette also found that the child's

grades also seemed to reflect on how the child liked her teacher. If she liked her teacher the grades would be good, but if she didn't like her teacher the grades would be bad. (Trans. p. 236) Nevertheless, the child's test scores on how she was progressing as compared with others (T CAP) were consistently very high with only one exception. (Trans. P. 243) Although the child created some behavior problems at times, Ms. Devallette found her to express remorse and sorrow for misbehaving (Trans. p. 249). The child's teachers did not wish for the child to stay in advanced classes because of her inconsistent grades, however, the child's parents used what's known as a "parental override" to keep the child in advanced placement over the teachers' objections. (Trans. pp. 249-250) Also, according to her mother, the child also did not want to stay in advanced classes. (Trans. p. 390)

Neither of the child's parents remember ever expressing significant concern about the child's behavior to the school personnel before February 1999. (Trans. p. 180) The child's mother did not think her daughter was "emotionally disturbed" but on occasion was just acting out. (Trans. p. 215) The child's mother thought that her daughter's behavior problems in many cases stemmed from her teachers and the way they acted toward her daughter. (Trans. p. 200) For example, she felt that in the fifth grade when her daughter was having problems that her daughter's teacher was "reacting very sharply to minor offenses" and felt one teacher was a "control freak." (Trans. p. 200)

Steve Barnett, the Vice Principal at the child's school during the year 1998, who has a degree in special education with an emphasis in emotional disturbance and behavior disorders, regularly saw the child in the hallways and on other occasions in his office for tardiness and some other issues. From his direct encounters with the child, Mr. Barnett did not find her to be emotionally disturbed. (Trans. pp. 303-306)

Hal Jernigan, a psychologist with the school system, testified that he knew the child and tested her as a school psychologist when her father requested that she be considered intellectually gifted. He did not find her to have problems which would cause him to certify her as emotionally disturbed. He felt the child had some emotional issues dealing with her parents and with authority figures, but certainly not problems where he could label her as "emotionally disturbed" under the law. (Trans. pp. 337-338)

When the child was in eighth grade she was involved with three other young people during the nighttime of January 31, 1999 wherein her school received serious damage from vandalism. The vandalism included, among other things, the destruction of twelve computers, serious damage to several rooms, broken windows and damages to school equipment. There were also VCR's taken from the school. The costs associated with the damage done through the vandalism was estimated at \$36,000. (Exhibit 1 - Hearing Documentation Section) The child admitted planning and being present when the acts of vandalism and theft occurred and gave a statement of her involvement on February 1, 1999. (Exhibit 1 - ORPD Statement)

On February 2, 1999 the parents of the child were notified by the school system of an IEP meeting to consider a "manifestation determination based upon your child's disability prior to a disciplinary action/hearing." (Exhibit 1 - Invitation to IEP meeting 4/4/99)

On February 10, 1999 the IEP meeting was held and the parents of the child attended the meeting. The results of the meeting were that the IEP-Team determined that the child's participation in vandalism was not a manifestation of the child's "disability" of intellectual giftedness and that discipline may be administered through the normal School District Regulations. The parents wrote their comments on the report of the IEP-Team that the "behavior or situation in question" was the

child being present at the school when acts of vandalism and theft were committed. They also noted that they "disagree with parts of the conclusion." (Exhibit 1 - Exclusivity Action 2/10/99) The parents do not remember discussions in the IEP meeting concerning whether or not the child could have been suffering from another disability but Dr. Jernigan, the school psychologist who attended the IEP meeting, specifically recalled discussions in the IEP-Team of other disabilities and whether there was any further need for assessment. The IEP-Team determined that there was no other disability condition nor a need for further assessment at that time. (Trans. pp. 187 and 346-347) Also, Dr. Jernigan recalls that the child's parents did in fact agree with the IEP-Team that intellectual giftedness was not a cause of the child's participation in vandalism. (Trans. P. 346)

The group had examined the child's IEP, discussed the behavior of the child among themselves and the parents, evaluated the placement and services, had Dr. Jernigan, the psychologist who administered tests on the child, participate in the meeting and had discussed other disabilities and the need for further assessment. The IEP-Team found that the disability did not impair the child's ability to understand the consequences of her actions or affect her ability to control her actions. (Trans. P. 346)

On February 12, 1999 the child was suspended from school until February 1, 2000 but the child could attend alternative school beginning on August 23, 1999. (Exhibit 1 - Expulsion Notice 2/12/99). On March 16, 1999 a hearing was held by the School System Disciplinary Hearing Authority wherein the parents were present and represented by their attorney. At the conclusion of the hearing, the prior suspension terms were upheld. (Exhibit 1 - Hearing Documentation)

On February 24, 1999 the parents of the child were notified of a meeting to be on March 3, 1999 wherein special education services for the child would be discussed while the child was

suspended. The child was enrolled in a private school during the remainder of the school year through the spring of 1999. (Exhibit 1 - Invitation to IEP meeting 4/27/99)

After the child was suspended from school, she was seen by Dr. James Murray, a psychologist. Dr. Murray's testimony was presented at this hearing as an expert witness for the Petitioners. Dr. Murray evaluated the child during the months of May and June 1999. Dr. Murray concluded that the child's disability of giftedness did not in any way contribute to her actions of vandalism. (Dr. Murray's deposition at pp. 36-37) Furthermore, Dr. Murray stated that in his expert opinion the child did not have any other disability under State or Federal law or regulation. (Dr. Murray's deposition at p. 36.) Moreover, Dr. Murray believed that an alternative school placement for a period of time was acceptable and probably a "helpful response" to the child's actions. (Dr. Murray's deposition at p. 23.)

The child's father candidly testified that he could not say that giftedness was the basic cause for his daughter's actions but only that it was a contributing factor along with her "interest" in one of the boys involved. He believes that "raging hormones in a 14 year old" contributed to the incident. (Trans. pp. 182, 183, 184 and 187)

Bobbie Bolt, the Gifted Services Coordinator of the School System, testified regarding the educational program that has been established for the child at the alternative school. Ms. Bolt would be the teacher providing gifted services to the child and would meet with the child on a weekly basis. (Trans. P. 367) From her testimony, it was apparent that much thought and planning had gone into the child's program so that she would still receive an education in the alternative school which would allow her to continue her "advanced" course of studies. The child would take Wellness Aid, U.S. Government, Biology, Advanced English and Geometry. Ms. Bolt was also looking into

continuing Spanish through computer programs and then placement into a proper advanced program in the regular school when the child was readmitted. (Trans. Pp. 371-372) Also, Ms. Bolt was coordinating the biology class so that the child would not be penalized for not participating in labs. The child was going to be placed in a class when she returned to regular school where the labs were conducted in the second half of the year. (Trans. P. 372) The educational program conforms with the goals and strategies set forth in the child's IEP for 8/23/99 until 1/23/2001 (Exhibit 1 - IEP 1999-2000 - 7/12/99).

Findings

Tennessee Code Annotated Section 49-10-102(1)(B) defines a child with disabilities as follows:

“Child with disabilities” means a child with mental retardation, having impairments (including deafness), speech or language impairments, visual impairments (including blindness), emotional disturbance, orthopedic impairments, autism, traumatic brain, other health impairments, specific learning disability, developmental delay, functional delay, and the intellectually gifted. (Emphasis Added)

There is no dispute that the child in this matter has been certified as “disabled” by being “intellectually gifted.” Although the federal law regarding disabilities does not include “intellectually gifted,” the school system applied the federal law in reviewing this child's case and reaching a resolution.

Pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. Section 1415 (k) and the regulations relating to said Act 34 C.F.R. Section 300.523, in order for this child to be suspended for the one-year period, the child's behavior involving vandalism and theft could not be found to be a manifestation of the child's disability (intellectually gifted). The testimony in the case was basically

uncontroverted. No one believed that intellectually giftedness impaired the child's ability to control her behavior nor did it impair the ability of the child to understand the impact of the actions. The Petitioner's own expert, Dr. Murray, even agreed that the intellectual giftedness in no way contributed to the child's actions. Also, as presented in the records and testimony before the hearing officer, the child's IEP was appropriate for giftedness and was in fact in place at the time of the vandalism incident. Even the child's father candidly admitted that he believed the behavior had a lot to do with a boyfriend/girlfriend relationship and raging hormones of a teenager.

The IEP-Team appeared to follow the guidelines in the federal law and regulations. According to Dr. Jernigan, there was unanimity in the decision that giftedness was not the cause of the child's actions. The child understood the consequences of her actions and the disability did not impair her ability to control behavior. Moreover, even if the IEP-Team failed to strictly follow all the federal laws and guidelines, as the Petitioner contends, and a new IEP-Team meeting were held to determine whether the manifestation of the behavior was from giftedness, the Petitioner's own expert psychologist, Dr. Murray, who examined the child soon after the incident, would agree to the IEP-Team's conclusions. In fact, there was no credible proof presented that the child's behavior was a manifestation of her disability. All credible proof including the Petitioner's own expert, Dr. Murray, is in support of the IEP-Team's findings.

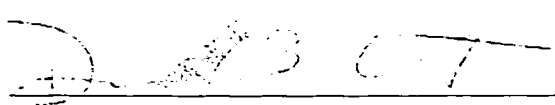
If there is no finding of manifestation then, in that event, the IEP-Team must consider if there was any other disability which may have caused the child's behavior. See 20 U.S.C. Section 1415 (k)(8) and 34 C.F.R. Section 300.527. In fact, the IEP-Team discussed this issue according to Dr. Jernigan. The child had been tested and observed and the testimony was that she in fact could not be labeled as "emotionally disturbed" or with any other type of disability. In fact,

the parents did not believe their child was emotionally disturbed. Even the parent's own expert, Dr. Murray, testified there was not any type of disability from which the child suffered. Thus, once again, the proof, even that from the child's own expert, supports the conclusion that the child did not suffer from any other disability other than intellectual giftedness.

If a child is placed in an alternative setting based upon behavior that is not a manifestation of a disability, then, in that event, the school system is obligated to "[p]rovide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving goals set out in the child's IEP." *34 C.F.R. Section 300.121(d)(2)(i)* In this case, it is clear from the testimony of the child's Gifted Services Coordinator, Bobbie Bolt, that this requirement would be met in the alternative school.

It is therefore **ORDERED, ADJUDGED, and DECREED** as follows:

- (1) That the Petition in this matter and demands made therein are dismissed.
- (2) Any party aggrieved by these findings may appeal to the appropriate State Court or Federal Court pursuant to law.



Daniel B. Eisenstein (#5570)
Administrative Law Judge
Suite 500
One Church Street Building
Nashville, Tennessee 37201
(615) 242-2521